COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP825 **Cir. Ct. No. 2017TP17**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE TERMINATION OF PARENTAL RIGHTS TO D. D.,
A PERSON UNDER THE AGE OF 18:

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

A. D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Monroe County: MARK L. GOODMAN, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] A.D. raises two arguments challenging the circuit court's order terminating her parental rights to D.D., both directed at the court's grant of partial summary judgment on the ground of "[c]ontinuing denial of periods of physical placement or visitation," establishing parental unfitness. *See* WIS. STAT. § 48.415(4). First, A.D. contends that genuine issues of material fact preclude partial summary judgment in the grounds phase. In substance, this argument is based on statutory interpretation. Second, she argues that § 48.415(4) violates substantive due process as applied to her. She may also intend to argue that § 48.415(4) is facially unconstitutional. *See* U.S. Const. Amend. 14; Wis. Const. Art. 1, § 1. I reject each argument and accordingly affirm.

¶2 On November 10, 2017, the Monroe County Department of Human Services petitioned to terminate A.D.'s parental rights to D.D., alleging, in pertinent part, continuing denial of periods of physical placement or visitation as the ground for involuntary termination. This ground requires the following proof, as pertinent to this appeal:

> (a) That the parent has been denied periods of physical placement by court order in an action affecting the family or has been denied visitation under an order under s. ... 48.363 ... containing the notice required by s. 48.356(2) ....
>
> (b) That at least one year has elapsed since the order denying periods of physical placement or visitation was issued and the court has not subsequently modified its order so as to permit periods of physical placement or visitation.

WIS. STAT. § 48.415(4).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 The County alleged that: an order denying A.D. periods of physical placement or visitation with D.D. was entered on November 9, 2016, under WIS. STAT. § 48.363, as part of a prior child in need of protection and services (CHIPS) proceeding; the November 9 no-visitation order contained the required notice under § 48.356(2), signed by A.D.; at least one year had elapsed since the order was entered; and the court had not modified the order to permit periods of physical placement or visitation.

¶4 The County moved for partial summary judgment as to grounds only. In support, the County submitted an affidavit of a case social worker, who averred in pertinent part that: in March 2015 the court adjudicated D.D. a child in need of protection and services; the court subsequently ordered a change of D.D.'s placement to out-of-home placement; on November 9, 2016, the court entered an order suspending A.D.'s visitation and contact with D.D.; the November 9 order stated conditions that A.D. would need to meet in order for visitation to resume and also included the requisite statutory termination of parental rights notice; and, the court never lifted or modified the order suspending visitation, which had been in place for over a year. Attached to the affidavit was a certified copy of the November 9 no-visitation order, along with the required notices, warnings, and conditions, signed by A.D. The County argued that there was no genuine issue of material fact as to any of the WIS. STAT. § 48.415(4) requirements.

¶5 Relying on a responsive brief and supporting affidavit, A.D. argued that there were issues of material fact regarding the reasonableness of the November 9 no-visitation order and whether the County made reasonable efforts to encourage A.D.'s compliance with the order, and that partial summary judgment would deprive her of her "due process right to present a full defense of the issues to the jury."

¶6 The circuit court granted partial summary judgment, and proceeded to the dispositional phase. The court terminated A.D.'s parental rights. A.D. appeals.

Partial Summary Judgment Decision

¶7 A circuit court may grant summary judgment to resolve the grounds phase of a termination of parental rights case when there is no genuine issue of material fact because undisputed proof of parental unfitness under WIS. STAT. § 48.415(4) is shown. ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶34, 39, 271 Wis. 2d 1, 678 N.W.2d 856 (citing WIS. STAT. § 802.08(2)). Appellate courts review summary judgment decisions de novo. ***Id.***, ¶20.

¶8 In order to establish grounds for termination based on continuous denial of periods of physical placement or visitation, the County was required to prove that: a CHIPS dispositional order denied A.D. visitation; the order contained the requisite notice concerning termination of parental rights; and at least one year elapsed between the time the order was issued and the time the County filed the petition for termination of parental rights, during which the court did not modify the order to permit periods of physical placement or visitation. *See* WIS. STAT. § 48.415(4).

¶9 On appeal, A.D. concedes that the November 9 no-visitation order "contained the requisite notice concerning termination of parental rights" and that A.D. signed the written notice, acknowledging both that the court had orally informed her of the grounds for termination and that she had received the notice. However, A.D. argues that there are "genuine issues of material fact" as to whether she was "denied" periods of physical placement or visitation under the November 9 no-visitation order, because the order prohibited her from having

contact with D.D. by directing that her periods of placement and visitation be "*suspended*," and did not use the term "*deny*," which is the term that appears in WIS. STAT. § 48.415(4). What A.D. characterizes as a genuine issue of material fact is properly viewed as an argument based on an interpretation of the term "deny" in § 48.415(4). I reject this argument.

¶10 First, A.D. did not present this "suspend versus deny" argument to the circuit court. Courts generally do not consider issues raised for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. I conclude that A.D. has forfeited her right to raise the argument on appeal and A.D. fails to provide a persuasive reason that I should entertain the argument despite her failure to preserve it in the circuit court.[2]

¶11 Second, even if I were to consider the argument on the merits, I would reject it. A.D. does not provide legal authority that would support a conclusion that there is a meaningful distinction between (1) prohibiting contact by *"*suspending*"* periods of placement and visitation with conditions that must be met to reinstate placement or visitation, and (2) prohibiting contact between a parent and a child by *"*denying*"* periods of placement and visitation with conditions that must be met to reinstate placement or visitation. Further, I see no starting point for this argument, given the fact that Wisconsin courts use the phrases "no-contact," "suspended," and "denial" interchangeably when referring to orders that form the basis for a termination of parental rights pursuant to WIS.

[2] Because I reject A.D.'s new "suspend versus deny" argument, I reject her related argument that the "distinction in language bears upon the notice provided to A.D. by the [November 9, 2016] order." This is apparently an argument that the notice accompanying the November 9 no-visitation order was deficient based on the "suspend versus deny" argument, in contradiction to her concession, noted above, that notice was properly given.

STAT. § 48.415(4). *See, e.g.*, ***Dane County DHS v. P.P.***, 2005 WI 32, ¶¶3, 9, 24, 279 Wis. 2d 169, 694 N.W.2d 344 (using "no-contact" order, order denying visitation, and order which "suspended" visitation to refer to the same concept); ***Ronald J.R. v. Alexis L.A.***, 2013 WI App 79, ¶¶2-3, 348 Wis. 2d 552, 834 N.W.2d 437 (order *suspending* physical placement formed basis for termination of parental rights on continuing *denial* ground); ***Peter H. v. Keri H.***, Nos. 2009AP2487, 2009AP2488, unpublished slip op., ¶¶2-3 n.2 (WI App April 23, 2010) (order *suspending* mother's placement rights formed basis for termination of parental rights on ground of continuing *denial* of physical placement or visitation).[3]

Constitutional Challenge

¶12 A.D. attempts to raise a substantive due process challenge to WIS. STAT. § 48.415(4).[4] Although she contends that her argument is limited to an as-applied challenge, some of her arguments are, in effect, facial challenges. In any case, I glean that she intends to argue that the circuit court denied her due process in granting partial summary judgment because the court did not give her an opportunity to present evidence that the November 9 no-visitation order was unreasonable, which involved evidence of some kind that could support the

[3] In addition, A.D. has not filed a reply brief addressing the County's argument that "[d]enial and visitation are not [terms] of art that carry any unusual meaning." This implicitly concedes the County's argument. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").

[4] All aspects of A.D.'s constitutional arguments are difficult to follow. One contributing factor may bear mentioning, which is that A.D. fails to take the basic step of grouping related sentences together, with one unifying topic per paragraph and transitions that link one paragraph to the next or the last. At best, using a single, long block of text to purportedly develop a constitutional argument creates unnecessary work for the reader. At worst, it creates confusion. Nevertheless, in the text I state and address the arguments that I can glean from the briefing.

inference that a social worker failed to make reasonable efforts to help A.D. meet the conditions necessary for visitation to resume or impeded her efforts to meet the conditions. I conclude that her constitutional arguments are meritless under case law that includes ***Dane County DHS v. P.P.***

¶13 This court reviews a constitutional challenge to a statute de novo. ***State v. Wood***, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63.

¶14 I first address the facial challenge that A.D. appears to attempt to make. A.D. suggests that it always violates substantive due process for a circuit court to enter partial summary judgment when the ground for termination is WIS. STAT. § 48.415(4), because courts make a grounds determination on this basis without holding a hearing providing the parent with the opportunity to present evidence that the parent had good reason to fail to obtain modification of the order at issue. However, requiring a fact-finding hearing at the unfitness phase would run counter to ***P.P.*** and ***Steven V.***. *See* ***P.P.***, 279 Wis. 2d 169, ¶32 (rejecting a facial challenge to WIS. STAT. § 48.415(4) (2001-02) on substantive due process grounds); ***Steven V.***, 271 Wis. 2d 1, ¶¶6, 35-37, 44 (allowing partial summary judgment based on the absence of a genuine issue of material fact in the fitness phase).[5]

¶15 In ***P.P.***, the parent argued that WIS. STAT. § 48.415(4) violates substantive due process because it allows a court to terminate parental rights

[5] Neither party argues that there is any difference that would matter to my analysis between the language of WIS. STAT. § 48.415(4) (2001-02) as considered by the court in both ***Dane County DHS v. P.P.***, 2005 WI 32, ¶¶3, 9, 24, 279 Wis. 2d 169, 694 N.W.2d 344 and ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶34, 39, 271 Wis. 2d 1, 678 N.W.2d 856, and the current version of the statute.

without making an explicit finding of unfitness. *See* ***P.P.***, 279 Wis. 2d 169, ¶¶15, 24-26, 32. The court concluded that adequate due process is contained in the "statutory step-by-step process" established in § 48.415(4)—typically, the process that must be followed in a CHIPS proceeding—that leads up to a termination of parental rights. *See* ***P.P.***, 279 Wis. 2d 169, ¶¶26, 32. This "step-by-step process" serves as an effective "funnel, making smaller and smaller the group of parents whose relationships with their children are affected at each step, until only a very small number of parents would be affected by § 48.415(4)." ***Id.***, ¶32. The court reasoned that "[t]he findings that are required for a court to proceed against a parent at each of the steps prior to the final step under § 48.415(4) involve an evaluation of a parent's fitness." ***Id.*** Given this discussion in ***P.P.***, the argument that A.D. makes to the effect that an additional hearing is required must be directed to the legislature or to our supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

¶16 I now turn to A.D.'s as-applied challenge. It is loosely tied to the fact that the court in ***P.P.*** stated that parents might be able to make viable as-applied challenges to WIS. STAT. § 48.415(4) by establishing that they were prevented from presenting evidence of valid reasons for their failure to obtain modification of an order denying visitation or physical placement, or that the circuit court ignored their evidence on this point. *See* ***P.P.***, 279 Wis. 2d 169, ¶25 & n.6. Using this concept as a departure point, A.D. apparently intends to argue that facts in this case make § 48.415(4) unconstitutional as applied to her. However, discussion in ***P.P.*** also defeats her as-applied argument on the undisputed facts here.

¶17 The court in ***P.P.*** explained that an as-applied challenge under WIS. STAT. § 48.415(4) will be denied if the reviewing court determines that, during the course of the process leading up to the application of § 48.415(4), the parent was provided with an opportunity to submit evidence supporting the conclusion that the parent failed for good reasons to obtain modification of the order denying visitation or physical placement. ***P.P.***, 279 Wis. 2d 169, ¶¶25, 32. The record here reflects that, as described above, A.D. was permitted to seek modification of the November 9 no-visitation order containing conditions to allow visitation or periods of physical placement, and that she availed herself of this opportunity, filing a motion to reinstate visitation and contact in September 2017. The court considered and denied the motion at a hearing in October 2017. Under ***P.P.***, this defeats A.D.'s as-applied argument.

¶18 A.D. contends that the court declined to modify the November 9 no-visitation order because a social worker provided misinformation relating to A.D.'s stability and sobriety. However, A.D. apparently raised this topic for the first time in connection with partial summary judgment.[6] A.D. fails to establish that she presented the circuit court with evidence of alleged misinformation at an appropriate time in the step-by-step process. As the circuit court pointed out, consistent with the reasoning of ***P.P.***, all of the alleged misinformation that A.D.

[6] Separately, I observe that, even now, A.D. fails to explain specifically what was allegedly inaccurate in the information supplied to the circuit court by the social worker or how inaccuracies prevented her from persuading the court to modify the November 9 no-visitation order.

points to could have and should have been raised in the CHIPS case, rather than at the partial summary judgment stage.[7]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[7] In addition, as with the first issue, by failing to file a reply brief, A.D. implicitly concedes the County's argument that she was afforded substantive due process through the manner in which the CHIPS and TPR cases proceeded.